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11 UNITED STATES DISTRICT COURT
12
13 FOR THE CENTRAL DISTRICT OF CALIFORNIA
14
15 WESTERN DIVISION
16

17 KAMBIZ BATMANGHELICH, et al.,

18 Plaintiffs,

19 v.

20 SIRIUS XM RADIO, INC. and
21 STREAM INTERNATIONAL, INC.

22 Defendants.
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CASE NO. CV 09-9190 VBF(JCx)

**OBJECTOR DAVE DENNY'S
REPLY TO PLAINTIFF'S
RESPONSE TO OBJECTIONS TO
CLASS ACTION SETTLEMENT**

Date: September 12, 2011

Time: 1:30 p.m.

Judge: Hon. Valerie Baker Fairbank

Courtroom: Dept. 9

312 N. Spring St.

Los Angeles, CA 90012

I. PLAINTIFF'S *AD HOMINEM* ATTACKS ON OBJECTOR'S COUNSEL ARE MERITLESS, IRRELEVANT, AND SEEK TO IMPROPERLY FOCUS THE COURT'S ATTENTION AWAY FROM DEFECTS IN THE PROPOSED SETTLEMENT

Plaintiff Kambiz Batmanghelich ("Plaintiff") attempts to support the approval of the Proposed Settlement by impugning objectors' counsel and portraying objectors, generally, in a negative light. In referring to class member Dave Denny's ("Objector") counsel as a "professional objector," Plaintiff suggests that Mr. Denny's objections should be disregarded merely because Objector's counsel has appeared in other class action settlements and represented class members who object to proposed settlements.

Application of the moniker "professional objector" to absent class members and their counsel who dare to raise concerns regarding proposed class settlements is now in vogue with the class action plaintiffs' bar. The term "professional objector" was adopted by the plaintiffs' bar in its quest to marginalize dissenting voices by engaging in *ad hominem* attacks. Judge Richard Kramer who presides in the complex litigation department of the Superior Court of the State of California for the County of San Francisco addressed the "professional objector" argument as follows:

I have never understood the term "professional objector." The lawyers that appear in front of me are professionals as I would think that if I heard the term "unprofessional objector," I would

1 be very much concerned.¹

2 Judge Kramer expounded,

3
4 I have made this point in countless legal education and education
5 of judges courses that I have taught in class actions. I make this
6 comment in my California civil procedure class at Hastings that I
7 teach every year. And I have on occasion, such as I am now,
8 taken the opportunity to point that out. A "professional objector"
is not a pejorative term as far as I am concerned, especially when
it's coming from professional something elses.²

9
10 Plaintiff's *ad hominem* attacks on Objector's counsel comprise a violation of
11 Plaintiff's counsel's duty of candor to the Court. Class counsel are aware that the
12 outrageous accusations contained in the document they have submitted are not
13 supported by fact or law. Plaintiff's counsel attempt to tar the reputation of
14 Objector's counsel not with honest argument on relevant issues but with false
15 statements that counsel are "unscrupulous attorneys" and are "exploiting the right to
16 object to class action settlements by filing objections and subsequent appeals for the
17 sole purpose of extorting a pay-off." *Plaintiff's Response to Objections*; Doc. 81,
18 3:14-17. This is a serious accusation and is unwarranted by reference to objections
19 filed in this case which were drafted with specific reference to the Settlement
20 Agreement and supporting documents.
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25 Plaintiff misconstrues (or alternatively desires to ignore) the intent of the law

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27 ¹ Transcript of Proceedings, August 6, 2010, 15:24-27, *Credit / Debit Card Tying Cases*, Superior
Court of California, case no. JCCP 4335.

28 ² *Id.* at 16:7-9.

1 which provides for a procedure for class members who are not the named
 2 representatives to be represented and to have a voice in the determination as to
 3 whether the settlement is, in fact, fair, adequate, and reasonable. Despite what
 4 Plaintiff would have this Court believe, several courts have praised settlement
 5 objectors for their input in the fairness determination.³ Objectors in these cases
 6 were described as "volunteer lawyers for the class,"⁴ who raise "challenges free
 7 from the burden of conflicting baggage that Class Counsel carries."⁵ In fact, Judges
 8 Posner and Easterbrook, as well as others, have advocated freely allowing objector
 9 intervention to monitor against collusion and unfair settlement terms.⁶

13 Furthermore, courts have praised the very counsel Plaintiff seeks to malign in
 14 his response to objections. For example, with regard to Objector's counsel John W.
 15 Davis, Judge R. David Proctor noted, "The court was very impressed with Mr.
 16 Davis and fully appreciates both his candor and advocacy."⁷ Objector's counsel has,
 17 in many instances, obtained substantial benefits for class members and
 18 improvements to proposed settlements. For example, Objector's counsel's efforts in
 19 *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948 (9th Cir. 2009) resulted in an

24 ³ Mike Absmeier, *The Professional Objector and Revised Rule 23: Protecting Voice Rights While*
 25 *Limiting Objector Abuse*, 24 Rev. Litig. 609, 1616 (2005).

25 ⁴ *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002).

26 ⁵ *In re Prudential Ins. Co. Am. Sales Practice Lit. Agent Actions*, 278 F.3d 175, 202 (3d Cir.
 27 2002).

27 ⁶ For a discussion of "whether objectors to class action settlements add to the efficiency and
 28 fairness problems that plague modern class actions," see, for example, Edward Brunet, *Class*
Action Objectors: Extortionist Free Riders or Fairness Guarantors, 2003 U.CHI. LEGAL F. 403.

1 increase in the value of the common fund of more than nine million dollars. The
 2 Law Office of John W. Davis and Kendrick & Nutley were the sole firms awarded
 3 fees by the court in that matter for their efforts in assisting in the court's evaluation
 4 of the settlement.⁸ Objector's counsel is presently seeking to preserve the
 5 enhancement of the *Rodriguez* common fund in the United States Court of Appeals
 6 for the Ninth Circuit.⁹

9 In another recent case involving Objector's counsel, Judge Jeremy Fogel
 10 found, "*The objectors' concerns about the e-credits are valid. The fact that the*
 11 *credits are nontransferable, redeemable only at HP.com, and cannot be used with*
 12 *other coupons or discounts significantly reduces their cash value. In many ways, the*
 13 *e-credits are indistinguishable from a marketing technique HP might employ to*
 14 *attract consumers to its commercial website.*"¹⁰ Notably, Plaintiff's attack on
 15 objectors and their counsel fails to mention that objectors were actually *successful* in
 16 many of the cases cited by Plaintiffs. *See, e.g., The Authors Guild Inc. v. Google,*
 17 *Inc.*, 2009 WL 2980745 (S.D.N.Y. September 8, 2009) (declining to approve
 18 settlement on an "opt-out" basis); *In re Visa Check/Mastermoney Antitrust Litig.*,
 19 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) (reducing class counsel's requested fees

24 ⁷ *Faught v. American Home Shield Corp.*, USDC Northern District of Alabama, Case No. 2:07-
 25 cv-01928-RDP, Doc. 105 at 32

26 ⁸ *Rodriguez v. West Publishing Corp.*, USDC Central District of California, Case No. 2:05-cv-
 27 03222-R-Mc; Doc. 563, Transcript of Proceedings, July 13, 2009, 7:8-14.

⁹ USCA Ninth Circuit case nos. 10-55342 and 10-56730

28 ¹⁰ *In re HP Inkjet Printer Litigation*, USDC Northern District of California, Case No. C05-3580
 JF; Doc. 287 at 9.

1 thereby increasing the value of the common fund).

2 In simplest terms, this case should not be based on “name-calling” by the
3 parties. The Court’s determination with regard to final approval of this Proposed
4 Settlement should boil down to the unequivocal question in class action settlements,
5 and that is whether the settlement, as proposed, is fair, adequate, and reasonable.
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8 **II. CLASS MEMBER DAVE DENNY HAS SUBMITTED EVIDENCE OF** 9 **CLASS MEMBERSHIP**

10 Objector filed a declaration in the above-captioned matter affirming class
11 membership (Doc. 77). Accordingly, Objector has standing to raise concerns
12 regarding the settlement. Objector furnished reference to his Sirius account number
13 and offered to provide further information to counsel upon request. Neither counsel
14 for the class nor the defendant has made such a request.
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17 In his Response to Objections to Class Action Settlement, Plaintiff posits that
18 objectors should have submitted telephone records. There is no such requirement in
19 the Notice of Class Action Settlement. Moreover, if such a requirement exists then
20 the Notice is deficient and a remedial notice campaign should be undertaken.
21
22 Notwithstanding the problems with the claims process articulated by Objector in his
23 Objection to Proposed Settlement, Plaintiff’s own attempts to impose additional
24 undisclosed requirements upon absent class members underscore the need for
25 heightened scrutiny of the approval process including claim processing, monitoring,
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1 and review.

2 Additionally, even if Objector's submissions were somehow deficient, which
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4 they are not, objections which have been brought to the attention of the Court and of
5 counsel for proponents of a settlement by counsel for objectors should not be
6 disregarded simply because they do not precisely comply with the procedures for the
7 filing of individual objections specified in the notice of settlement. *See, e.g.,*
8 *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 235 (2001); *see also*
9 *Weinberger v. Kendrick*, 698 F.2d 61, 69 (2nd Cir. 1982), *cert. denied*, 464 U.S. 818
10
11 (1983).
12

13 Objector timely filed his objection and has filed a sworn declaration affirming
14 his class membership. Accordingly, Plaintiff's standing argument is without merit.
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16 **III. PLAINTIFF OVERSTATES THE VALUE OF THE SETTLEMENT**
17 **AND THE RISK ASSOCIATED WITH ACHIEVING IT**
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19 Plaintiff appears to make the erroneous inference that because "evidence
20 indicated that only around half of the telephone calls were recorded during the
21 relevant period," then a similar percentage of class members making claims would
22 not be able to recover more at trial than the amount offered by the Proposed
23 Settlement. *Plaintiff's Response to Objections*; Doc. 81; 15:22 – 16:4. This
24 argument relies on at least two assumptions: (1) that each class member can only
25 recover for one call to Sirius which was recorded without his or her knowledge; and
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1 (2) that every caller to Sirius during the class period submits a claim form. Of
2 course, one purpose of the claim form is to identify Sirius subscribers with valid
3 claims. If the claim form, as well as notice to class members, is appropriately
4 designed, the result should be that the majority of submitted claims are ultimately
5 accepted.
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8 Even if we presuppose that a large number of claims in this case will be
9 disqualified, it is a stretch to assume that fully half of the claims submitted will be
10 disqualified. Such a result in and of itself would suggest serious deficiencies with
11 the notice and claims process. Moreover, even if we accept Plaintiff's argument at
12 face value that roughly one half of claimants would not be able to recover at trial,
13 that begs the question of why class members are receiving only 20% of the available
14 statutory damages based on claims received as of July 19, 2011. *Id.* at 16:22-26.
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17 Additionally, Plaintiff touts the "extensive" and "substantial" risks associated
18 with this litigation. *Plaintiff's Response to Objections*; Doc. 81; 17:5-10.
19

20 However, this is not a novel or difficult case. Damages are statutorily prescribed
21 and discovery should yield a fairly accurate picture of the scope of damages –
22 despite the parties' assertion that analysis of damages is "difficult." *Id.* at 16:27.
23 Even if the individual identities of callers who were recorded cannot be ascertained,
24 such a scenario does not preclude a ready calculation of damages in the aggregate.
25

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27 The issues asserted in this case have been litigated extensively in the past.
28 For example, the controversy at issue in the instant matter was largely previously

1 litigated by plaintiff Nikki Greenberg in *Greenberg v. E*Trade Financial*, Superior
2 Court for the State of California, County of Los Angeles, case number BC 360152.
3
4 In fact, the same attorney who is defending Sirius in the case at bar, Mr. Totino of
5 DLA Piper, defended E*Trade in the prior wiretapping litigation. This is not a
6 novel issue. Wiretapping claims such as those prosecuted in this case have been
7 well litigated in recent years. Accordingly, Plaintiff had a ready-made blueprint for
8 his case.
9

10 In light of the foregoing, the Court should be skeptical of overblown claims of
11 either risk or difficulty in determining: (1) whether the settlement amount is
12 reasonable when considered in tandem with the aggregate value of statutory claims;
13 and (2) in determining any risk multiplier to be applied to counsel's lodestar.
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16 **IV. PLAINTIFF FAILS TO ADEQUATELY EXPLAIN THE DISPARITY IN**
17 **RECOVERY BETWEEN LEAD PLAINTIFF AND**
18 **ABSENT CLASS MEMBERS**
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20 As Plaintiff correctly states, incentive awards are often appropriate if it is
21 necessary to induce an individual to participate in a suit. *See, e.g., Cook v. Niedert*,
22 142 F.3d 1004, 1016 (7th Cir. 1998). However, Objector questions the disparity
23 between Plaintiff's recovery and that of absent class members. This disparity
24 exceeds what would be necessary to induce a plaintiff to pursue litigation such as
25 this and seeks to compensate Plaintiff for actual damages in addition to providing a
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1 “service fee.” Plaintiff concedes that a separate, more favorable, deal was
2 negotiated concerning Plaintiff’s individual claims. *Plaintiff’s Response to*
3 *Objections*; Doc. 81; 14:12-13. This is not appropriate and puts Plaintiff’s interests
4 at odds with those of the class. *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 967-
5 968 (9th Cir. 2009).

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8 Moreover, simultaneous representation of clients with conflicting interests is
9 an automatic ethics violation in California and grounds for disqualification. “[A]n
10 attorney cannot recover fees for such conflicting representation.” *Rodriguez, supra*
11 at 967-968, citing *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354,
12 1358 (9th Cir. 1998). “The responsibility of class counsel to absent class members
13 whose control over their attorneys is limited does not permit even the appearance of
14 divided loyalties of counsel.” *Id.*

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18 **V. PLAINTIFF’S REQUEST FOR A BOND IS PRESUMPTUOUS,**
19 **PREMATURE, AND PRECLUDED BY NINTH CIRCUIT PRECEDENT**

20 Plaintiff asks that any objector whose objection is overruled be required to
21 post a bond in order to exercise his or her appellate rights. This request is
22 extraordinarily premature in that the Court has not even held a hearing on final
23 approval, let alone issued an order. Accordingly, it is impossible to know what, if
24 any, issues might be appealed. It is entirely presumptuous of Plaintiff to conclude a
25 notice of appeal will be filed when the Court has not yet undertaken final
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1 consideration of the matter. Moreover - particularly in light of the facts of this case,
2 and the legal basis for Plaintiff's claims - Plaintiff's attempt to avoid judicial
3 scrutiny by imposing additional burdens upon any would-be appellant is unfounded
4 and disfavored by the Ninth Circuit. *Azizian v. Federated Dep't Stores, Inc.*, 499
5 F.3d 950 (9th Cir. 2007).
6

7 8 VI. CONCLUSION

9 For the foregoing reasons, and those articulated in Objector's Objection to
10 Proposed Settlement and Notice of Intent to Appear, Objector respectfully requests
11 that the Court withdraw its conditional approval of the Proposed Settlement.
12

13 Objector hereby reserves the right to amend and refine his objections as more
14 information is made available.
15

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17 Respectfully submitted this 29th day of August, 2011.
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19 LAW OFFICE OF JOHN W. DAVIS
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21
22 by: /s/ John W. Davis.

23 John W. Davis
24 Counsel for Objector
25 Dave Denny
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